

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of: :

Andrea Simmons, Executrix :

The Estate of Roger G. Fussell :

272 SE Dustin Terrace :

Lake City, FL 32025 :

Respondent, :

U.S. EPA Docket Number :

RCRA-03-2011-0197 :

The Bruce Store :

Route 219/250 South :

Beverly, West Virginia 26252 :

Facility Id. No. 4-208036 :

Facility. :

I. INTRODUCTION

This Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or the "Agency") by Section 9006 [*federal facilities only* - and 9007(a)] of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively "RCRA"), 42 U.S.C. § 6991e [and 6991f], and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules of Practice"), a copy of which is enclosed with this Complaint (Enclosure "A").

The Director of the Land and Chemicals Division of U.S. EPA Region III ("Complainant"), hereby notifies Andrea Simmons in her capacity as the Executrix of the Estate of Roger G. Fussell ("Respondent") that EPA ~~has reason to believe that~~ Respondent has violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, and the State of West Virginia's federally authorized underground storage tank program with respect to the underground storage tanks at Respondent's facility located at Route 219/250 South, Beverly, West Virginia (the "Facility"). Section 9006 of RCRA, 42 U.S.C. § 6991e, authorizes EPA to take enforcement action, including issuing a compliance order or assessing a civil penalty, whenever it is determined that a person is in violation of any requirement of RCRA Subtitle I, EPA's regulations thereunder, or any regulation of a state underground storage tank program which has been authorized by EPA.

On April 10, 1996 pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the State of West Virginia was granted final authorization to administer a state underground storage tank management program *in lieu* of the Federal underground storage tank management program established under Subtitle I of RCRA, 42 U.S.C. §§6991-6991i. The authorization of West Virginia's underground storage tank program became effective on July 1, 1996. The provisions of West Virginia's authorized underground storage tank program regulations, set forth in West Virginia's Underground Storage Tank Regulations ("WVUSTR"), which incorporate by reference the federal underground storage tank program regulations set forth at 40 C.F.R. Part 280 (1995 ed.), have become requirements of Subtitle I of RCRA and are, accordingly, enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. A copy of the authorized WVUSTR, Parts 33-30-1 through 33-30-4.6, and the federal underground storage tank program regulations, 40 C.F.R. Part 280 (1995 ed.), are enclosed with this Complaint (Enclosure B). The authorized West Virginia underground storage tank regulations are cited as the legal basis for EPA's Complaint along with the incorporated provisions of the federal regulations.

Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d), authorizes EPA to assess a civil penalty against any owner or operator of an underground storage tank who fails to comply with, *inter alia*, any requirement or standard promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991b (40 C.F.R. Part 280) or any requirement or standard of a State underground storage tank program that has been approved by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c.

EPA has given the State of West Virginia notice of the issuance of this Complaint in accordance with Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991e(a)(2).

In support of this Complaint, the Complainant makes the following allegations, findings of fact and conclusions of law:

II. COMPLAINT **Findings of Fact and Conclusions of Law**

In accordance with the *Consolidated Rules of Practice* at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), Complainant makes the following findings of fact and conclusions of law:

1. The United States Environmental Protection Agency's Office of Administrative Law Judges has jurisdiction over this matter pursuant to RCRA Section 9006(a) and (d), 42 U.S.C. § 6991e(a) and (d), and 40 C.F.R. § 22.1(a)(4) and .4(c).
2. Andrea Simmons, Executrix of the Estate of Roger G. Fussell, is a "person" as defined by WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12), Section 9001(5) of RCRA, 42 U.S.C. § 6991(5).

3. Roger G. Fussell is and/or was, the "owner" and/or the "operator" of "underground storage tanks" ("USTs"), as these terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) located at the Facility.
4. Roger G. Fussell died testate on December 21, 2009 and Roger G. Fussell named his daughter, Andrea Simmons, as the Executrix of his Last Will and Testament.
5. Andrea Simmons, as the Executrix of the Estate of Roger G. Fussell is, at the time of the violations alleged in this Complaint, the "owner" and/or the "operator" of "underground storage tanks" ("USTs"), as these terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) located at the Facility.
6. On September 21, 2010, an EPA representative conducted an inspection of the Facility pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d.
7. At the time of the September 21, 2010 inspection, and at all times relevant hereto, four (4) USTs, as described in the following subparagraphs, were located at the Facility:
 - A. a ten thousand (10,000) gallon steel tank that was installed in or about 1990 and that, at all times relevant hereto, routinely contained diesel, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 1");
 - B. an eight thousand (8,000) gallon steel tank that was installed in or about 1990 and that, at all times relevant hereto, routinely contained gasoline, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 2"); and
 - C. a six thousand (6,000) gallon steel tank that was installed in or about 1990 and that, at all times relevant hereto, routinely contained gasoline, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 3"); and
 - D. a six thousand (6,000) gallon steel tank that was installed in or about 1990 and that, at all times relevant hereto, routinely contained diesel, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 4").
8. USTs Nos. 1 through 4, referenced in the immediately preceding Paragraph, are "petroleum UST systems" and "new tank systems" as defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12).

9. USTs Nos. 1 through 4 were, at all times relevant to this Complaint, used to store and routinely contained "regulated substance(s)" at Respondent's Facility, as defined in Section 9001(2) of RCRA, 42 U.S.C. § 6991(2), and WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12).
10. Pursuant to RCRA Section 9005, 42 U.S.C. § 6991d, on January 19, 2011, EPA issued an Information Request to Respondent concerning its petroleum UST systems at the Facility.

COUNT 1

(Failure to perform release detection on
USTs Nos. 1 through 4)

11. The allegations of Paragraphs 1 through 10 of this Complaint are incorporated herein by reference.
12. Pursuant to WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c), owners and operators of new and existing UST systems must provide a method or combination of methods of release detection monitoring that meets the requirements described therein.
13. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a) provides, in pertinent part, that USTs shall be monitored at least every 30 days for releases using one of the methods listed in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d) through (h), except that:
 - (1) UST systems that meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 (Performance Standards for New UST Systems) or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Upgrading of Existing UST Systems), and the monthly inventory control requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(a) or (b) (Inventory Control or Manual Tank Gauging), and tank tightness testing, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(c) (Tank Tightness Test), at least every 5 years until December 22, 1998, or until 10 years after the UST is installed or upgraded under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21(b) (Tank Upgrading Requirements); and

- (2) UST systems that do not meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 (Performance Standards for New UST Systems) or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Upgrading of Existing UST Systems), may use monthly inventory controls, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(a) or (b) (Inventory Control or Manual Tank Gauging) and annual tank tightness testing, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(c) (Tank Tightness Test) until December 22, 1998, when the tank must be upgraded under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Tank Upgrading Requirements) or permanently closed under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71; and
- (3) Tanks with a capacity of 550 gallons or less and not metered may use weekly tank gauging, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(b).
14. From at least September 21, 2010 until May 4, 2011, Respondent's UST No. 1 at the Facility has not been monitored in compliance with any of the methods set forth in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a)(1)-(3) and/or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d)-(h).
15. From at least September 21, 2010 until at least the filing of this Complaint, Respondent's USTs Nos. 2 through 4 at the Facility have not been monitored in compliance with any of the methods set forth in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a)(1)-(3) and/or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d)-(h).
16. Respondent's acts and/or omissions as alleged in Paragraphs 14 and 15, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c) and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a).

COUNT 2

(Failure to perform automatic line leak detector testing annually on
USTs Nos. 1 through 4)

17. The allegations of Paragraphs 1 through 16 of this Complaint are incorporated herein by reference.

18. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(b)(1) provides, in pertinent part, that underground piping that conveys regulated substances under pressure must:
 - (i) Be equipped with an automatic line leak detector conducted in accordance with subdivision 1 of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(a); and
 - (ii) Have an annual line tightness test conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(b) or have monthly monitoring conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(c).
19. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(a) provides, in pertinent part, that an annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.
20. From at least September 21, 2010 until May 4, 2011, the piping for UST No. 1 was underground and routinely conveyed regulated substances under pressure.
21. From at least September 21, 2010 until at least the filing of this Complaint, the piping for USTs Nos. 2 through 4 was underground and routinely conveyed regulated substances under pressure.
22. Respondent failed to perform an annual test of the automatic line leak detectors for the underground piping for UST No. 1 from September 21, 2010 until May 4, 2011.
23. Respondent failed to perform an annual test of the automatic line leak detectors for the underground piping for USTs Nos. 2 through 4 from at least September 21, 2010 until at least the filing of this Complaint.
24. Respondent's acts and/or omissions as alleged in Paragraphs 22 and 23, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(b)(1)(i) and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(a).

COUNT 3

(Failure to perform line tightness testing or monthly monitoring on piping for USTs Nos. 1 through 4)

25. The allegations of Paragraphs 1 through 24 of this Complaint are incorporated herein by reference.

26. From at least September 21, 2010 until May 4, 2011, Respondent failed to perform an annual line tightness testing in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(b) or have monthly monitoring conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(c) for the underground piping associated with UST No. 1.
27. From at least September 21, 2010 until at least the filing of this Complaint, Respondent failed to perform an annual line tightness testing in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(b) or have monthly monitoring conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(c) for the underground piping associated with USTs Nos. 2 through 4.
28. Respondent's acts and/or omissions as alleged in Paragraphs 26 and 27, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(b)(1)(ii), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(b) and (c).

COUNT 4

(Failure to test cathodic protection system on USTs Nos. 1 through 4)

29. Paragraphs 1 through 28 of this Complaint are incorporated by reference as if fully set forth herein.
30. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1) provides that all UST systems equipped with cathodic protection system must be tested for proper operation within 6 months of installation and at least 3 years thereafter by a qualified cathodic protection tester.
31. USTs Nos. 1 through 4 are and were, at the time of the violations alleged herein, "steel UST systems with corrosion protection" and were used to store regulated substances within the meaning of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31.
32. From at least September 21, 2010 until May 4, 2011, Respondent failed to conduct a test of the cathodic protection system as required by WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1) for the UST No. 1 at the Facility.
33. From at least September 21, 2010 until at least the filing of this Complaint, Respondent failed to conduct a test of the cathodic protection system as required by WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1) for the USTs Nos. 2 through 4 at the Facility.

34. Respondent's acts and/or omissions as alleged in Paragraphs 32 and 33, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1).

COUNT 5

(Failure to Provide Financial Assurance)

35. The allegations in Paragraphs 1 through 34, above, are incorporated herein by reference as though fully set forth at length herein.
36. WVUSTR Section 33-30-2.2.1 incorporates by reference 40 C.F.R. §§ 280.90 through 280.112, which provide, in pertinent part, that owners and operators of petroleum UST systems are required, with exceptions not relevant hereto, to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs. Subject to the limitations set forth in 40 C.F.R. §§ 280.94, incorporated by reference into WVUSTR Section 33-30-2.2.1, an owner or operator may demonstrate financial responsibility using any of the mechanisms set forth in 40 C.F.R. §§ 280.95 through 280.103.
37. From at least September 21, 2010 until at least the filing of this Complaint, Respondent did not demonstrate financial responsibility for USTs Nos. 1 through 4 by any of the methods set forth in 40 C.F.R. §§ 280.95 through 280.103, incorporated by reference into WVUSTR Section 33-30-2.2.1.
38. Respondent's acts and/or omissions as alleged in Paragraph 37, above, constitute a violation by Respondent of WVUSTR Section 33-30-2.2.1.

COUNT 6

(Failure to permanently close UST systems)

39. The allegations in Paragraphs 1 through 38, above, are incorporated herein by reference as though fully set forth at length herein.
40. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.70, owners and operators of an UST system that is temporarily closed for more than 12 months must permanently close the UST system in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71 if it does not meet either the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 for new UST systems or the upgrading requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21, with exceptions not relevant to this case.

41. Pursuant to WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71, in order to permanently close an UST system, the owner or operator must empty and clean the UST by removing all liquids and accumulated sludges from the UST, and remove the UST from the ground or filled with an inert solid material.
42. On or before June 30, 2006, the USTs at the Facility were placed into "temporary closure" within the meaning of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.70.
43. From at least June 30, 2006 until the date of this Complaint, the USTs at the Facility did not meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 for new UST systems or the upgrading requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 for the UST systems.
44. By July 1, 2007, the USTs at the Facility were required to be permanently closed in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
45. Upon information and belief, from at least September 21, 2010 until at least the filing of this Complaint, Respondent did not remove the UST systems from the Facility from the ground or fill the UST systems with an inert solid material and thus did not permanently close the UST systems as required by WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
46. Respondent's acts and/or omissions as alleged in Paragraph 45, above, constitute a violation by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.

COMPLIANCE ORDER

Pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e, Respondent is hereby ordered to:

47. Within forty-five (45) days of the effective date of this Compliance Order, comply with the release detection requirements of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c) for all UST systems located at the Facility subject to this Complaint or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
48. Within forty-five (45) days of the effective date of this Compliance Order, conduct a test of the line leak detector for USTs Nos. 1 through 4, and thereafter remain in compliance with line leak detector testing requirements of WVUSTR

Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(a) or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.

49. Within forty-five (45) days of the effective date of this Compliance Order, conduct a line tightness testing in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(b) or have monthly monitoring conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.44(c) for USTs Nos. 1 through 4, thereafter remain in compliance with line leak detector testing requirements of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.42(b)(1) or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
50. Within forty-five (45) days of the effective date of this Compliance Order, complete measures to ensure that the corrosion protection systems for USTs Nos. 1 through 4 are operated and maintained in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(a) or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
51. Within forty-five (45) days of the effective date of this Compliance Order, complete measures to ensure that the corrosion protection system for USTs Nos 1 through 4 are tested for proper operation by a qualified cathodic protection tester in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1) or upgrade the cathodic protection system for USTs Nos 1 through 4 in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21(b)(2) or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
52. Within forty-five (45) days of the effective date of this Compliance Order, demonstrate compliance with the financial responsibility requirements in accordance with WVUSTR Section 33-30-2.2.1 incorporates by reference 40 C.F.R. §§ 280.90 through 280.112 for all UST systems located at the Facility or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
53. If Respondent elects to close any or all of the USTs subject to this Compliance Order, Respondent must submit to EPA, within fifteen (15) calendar days after the effective date of this Compliance Order, a notice of intent to permanently close, identifying which UST(s) Respondent intends to close. Such notice shall be sent to Debra Moody at the address set forth below. A copy of such notice shall also be sent to WVDEQ at the address set forth below.

54. Within sixty (60) days of the effective date of this Compliance Order, submit to EPA a report which documents and certifies Respondent's compliance with the terms of this Compliance Order.
55. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Compliance Order shall be certified by the executor or executrix of Respondent.

The certification required above shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is true, accurate, and complete. As to [the/those] identified portions of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: _____

Name: _____

Title: _____

56. All documents and reports to be submitted pursuant to this Compliance Order shall be sent to the following persons:

Debra Moody
RCRA Compliance and Enforcement Branch (3LC70)
U.S. Environmental Protection Agency - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

and

Louis F. Ramalho
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency - Region III

1650 Arch Street
Philadelphia, PA 19103-2029

One copy of all documents submitted to EPA shall also be sent by regular mail to the attention of:

Ruth M. Porter
UST Program Manager
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
Telephone; 304-926-0499 ext. 1007
Fax: 304-926-0457
Ruth.M.Porter@wv.gov

57. If activities undertaken by the Respondent in connection with this Compliance Order or otherwise indicate that a release of a regulated substance from any UST at the Facility may have occurred, Respondent may be required to undertake corrective action pursuant to applicable regulations in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
58. Respondent is hereby notified that failure to comply with any of the terms of this Compliance Order may subject it to imposition of a civil penalty of up to \$37,500 for each day of continued noncompliance, pursuant to Section 9006(a)(3) of RCRA, 42 U.S.C. § 6991e(a)(3), the Debt Collection Improvement Act of 1996 ("DCIA"), and the subsequent Civil Monetary Penalty Inflation Adjustment Rules, 61 *Fed. Reg.* 69360 (December 31, 1996) and 69 *Fed. Reg.* 7121, 7126 (February 13, 2004), codified at 40 C.F.R. Part 19. (Enclosure "D" and "E").
59. The term "days" as used herein shall mean calendar days unless specified otherwise.

IV. PROPOSED CIVIL PENALTY

Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), provides, in relevant part, that any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by EPA under Section 9003 of RCRA, 42 U.S.C. § 6991c, or that is part of an authorized state underground storage tank program shall be liable for a civil penalty not to exceed \$16,000 for each tank for each day of violation. In accordance with the Adjustment of Civil Monetary Penalties for Inflation, promulgated pursuant to the Debt Collection Improvement Act of 1996 and codified at 40 C.F.R. Part 19, all violations of RCRA Section 9006(d)(2), 42 U.S.C. § 6991e(d)(2), occurring on or before March 15, 2004 are subject to a 1.00 increase for inflation, all violations occurring after March 15, 2004 are subject to a 1.1723% increase for inflation, and all violations occurring after January 12, 2009 are subject to a 1.4163 increase not to exceed \$16,000 per violation per day. For purposes of determining the

amount of any penalty to be assessed, Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), requires EPA to take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific penalty at this time, but will do so at a later date after an exchange of information has occurred. See 40 C.F.R. § 22.19(a)(4).

To develop a proposed penalty for the violations alleged in this Complaint, EPA will take into account the particular facts and circumstances of this case with specific reference to EPA's November 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations ("UST Penalty Guidance") (Enclosure C), the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19 (Enclosure D), and the Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (December 29, 2008) (Enclosure E). These policies provide a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases. As a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will also consider, among other factors, Respondent's ability to pay a civil penalty. The burden of raising and demonstrating an inability to pay rests with the Respondent. In addition, to the extent that facts and circumstances unknown to Complainant at the time of issuance of this Complaint become known after the Complaint is issued, such facts and circumstances may also be considered as a basis for adjusting a civil penalty.

This Complaint does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), an explanation of the number and severity of the violations alleged in this Complaint is set forth below.

Failure to provide release detection for USTs

The "potential for harm" for this violation is "major." Given that USTs are, by definition, underground, it is critically important that facility owners and operators utilize effective methods of detecting releases from such tanks. The prevention and detection of leaks are the cornerstones of the UST regulatory program. Respondent's failure to use an acceptable method of release detection created the possibility of a leak going undetected and harming human health or the environment.

The "extent of deviation" for this violation is "major." Failure to monitor an UST for releases at least every 30 days using an allowable method of release detection typically constitutes a "major" deviation from the requirements of the RCRA regulatory program.

Failure to perform automatic line leak detection annually.

The "potential for harm" for this violation is "major". It is critically important that facility owners and operators utilize effective methods of detecting releases from USTs and their associated piping. The prevention and detection of leaks are the cornerstones of the UST

regulatory program. Respondent's failure to perform an annual line leak detector test for the underground piping associated with USTs at the Facility presented a substantial risk to human health or the environment from a leak going undetected.

The "extent of deviation" for this violation is also "major" because it presents a substantial deviation from the requirements of the RCRA regulatory program.

Failure to perform annual line tightness testing or monthly monitoring.

The "potential for harm" for this violation is "major". It is critically important that facility owners and operators utilize effective methods of detecting releases from USTs and their associated piping. The prevention and detection of leaks are the cornerstones of the UST regulatory program. Respondent's failure to perform an annual line tightness test or monthly monitoring of underground piping associated with USTs at the Facility presented a substantial risk to human health or the environment from a leak going undetected.

The "extent of deviation" for this violation is also "major" because it presents a substantial deviation from the requirements of the RCRA regulatory program.

Failure to test cathodic protection system.

The "potential for harm" for this violation is "major." The purpose of cathodic protection testing is to ensure that releases due to corrosion are prevented for as long as the steel UST system is used to store regulated substances. Respondent failed performed a test of the cathodic protection system to ensure integrity of all the metal part of the UST systems at the Facility. Respondent's inaction posed a substantial actual or potential harm to human health and the environment in the event of a release into the environment.

The "extent of deviation" for this violation is "major." Failure to perform cathodic protection testing of the UST systems at the Facility presents a substantial act of noncompliance with the goals of the UST program.

Failure to comply with financial responsibility requirements.

The "potential for harm" for this violation is "major." Financial assurances are a key element of the UST regulatory system, ensuring that there are adequate resources available to properly address any releases which have occurred or will occur in the future that may cause significant adverse effects to the environment and the regulatory program.

The "extent of deviation" for this violation is "major." Under the UST Penalty Policy, the failure to provide financial assurances is a substantial deviation from the regulatory program.

Failure to permanently close UST systems.

The "potential for harm" for this violation is "major." Respondent's failure to permanently close the USTs systems at the Facility pose a substantial actual or potential harm to human health and the environment in the event of a release into the environment.

The "extent of deviation" for this violation is "major." Failure to permanently close the UST systems at the Facility presents a substantial from the regulatory program.

V. NOTICE OF RIGHT TO REQUEST A HEARING

Respondent may request a hearing before an EPA Administrative Law Judge and at such hearing may contest any material fact upon which the Complaint is based, contest the appropriateness of any compliance order or proposed penalty, and/or assert that Respondent is entitled to judgment as a matter of law. To request a hearing, Respondent must file a written answer ("Answer") within thirty (30) days after service of this Complaint. The Answer should clearly and directly admit, deny or explain each of the factual allegations contained in this Complaint of which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation and so states, such a statement is deemed to be a denial of the allegation. The Answer should contain: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) a statement of whether a hearing is requested. All material facts not denied in the Answer will be considered to be admitted.

Failure of the Respondent to admit, deny or explain any material allegation in the Complaint shall constitute an admission by Respondent of such allegation. Failure to Answer may result in the filing of a Motion for Default Order and the possible issuance of a Default Order imposing the penalties proposed herein without further proceedings.

Any hearing requested and granted will be conducted in accordance with the Consolidated Rules, a copy of which has been enclosed with this Complaint (Enclosure "A"). Respondent must send any Answer and request for a hearing to the attention of:

Regional Hearing Clerk (3RC00)
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

In addition, please send a copy of any Answer and/or request for a hearing to the attention of:

Louis F. Ramalho
Sr. Assistant Regional Counsel
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

VI. SETTLEMENT CONFERENCE

Complainant encourages settlement of this proceeding at any time after issuance of the Complaint if such settlement is consistent with the provisions and objectives of RCRA. Whether or not a hearing is requested, Respondent may request a settlement conference with the Complainant to discuss the allegations of the Complaint, and the amount of the proposed civil penalty. **HOWEVER, A REQUEST FOR A SETTLEMENT CONFERENCE DOES NOT RELIEVE THE RESPONDENT OF ITS RESPONSIBILITY TO FILE A TIMELY ANSWER.**

In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Complaint and its right to appeal the proposed Final Order accompanying the Consent Agreement.

If you wish to arrange a settlement conference, please contact Louis F. Ramalho, Senior Assistant Regional Counsel, at (215) 814-2681 prior to the expiration of the thirty (30) day period following service of this Complaint. Once again, however, such a request for a settlement conference does not relieve Respondent of its responsibility to file Answer(s) within thirty (30) days following service of this Complaint.

Please note that the Quick Resolution settlement procedures set forth in 40 C.F.R. § 22.18 do not apply to this proceeding because the Complaint seeks a compliance order. See 40 C.F.R. § 22.18(a)(1).

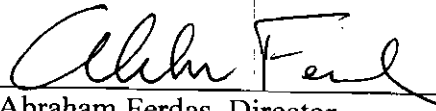
VII. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

The following Agency officers, and the staffs thereof, are designated as the trial staff to represent the Agency as the party in this case: the Region III Office of Regional Counsel, the Region III Land and Chemicals Division, and the Office of the EPA Assistant Administrator for Enforcement and Compliance Assurance. Commencing from the date of issuance of this Complaint until issuance of a final agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, nor Regional Judicial Officer, may have an *ex parte* communication with the trial staff or the merits of any issue involved in this proceeding. Please be advised that the Consolidated Rules prohibit

any *ex parte* discussion of the merits of a case with, among others, the Administrator, members of the Environmental Appeals Board, Presiding Officer, Judicial Officer, Regional Administrator, Regional Judicial Officer, or any other person who is likely to advise these officials on any decision in this proceeding after issuance of this Complaint.

Dated:

6/30/11



Abraham Ferdas, Director
Land and Chemicals Division
U.S. EPA Region III

- Enclosures:
- A. Consolidated Rules of Practice, 40 C.F.R. Part 22
 - B. WVUSTR, Parts 33-30-1 through 33-30-4.6, and 40 C.F.R. Part 280 (1995 ed.)
 - C. UST Penalty Guidance
 - D. Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19
 - E. Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (December 29, 2008)

CERTIFICATE OF SERVICE

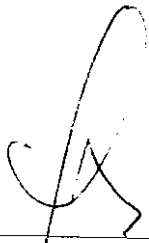
I, the undersigned, hereby certify that, on June 30, 2011, the original and one true and correct copy of the foregoing Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing was hand-delivered to and filed with the Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania, and that a true and correct copies of the Administrative Complaint and its enclosures were sent via Federal Express, signature confirmation requested upon the following:

Ms. Andrea Simmons
Executrix of the Estate of Roger G. Fussell
272 SE Dustin Terrace
Lake City, FL 32025

John J. Wallace, IV, Esquire
Wallace Law Offices L.C., Inc.
14 South Randolph Avenue
Elkins, West Virginia 26241

Heather M. Weese, Fiduciary Commissioner
Fiduciary Commissioner and Hearing Master
600 South Randolph Avenue, Suite 1
Elkins, West Virginia 26241

6/30/11
Date



Louis F. Ramalho
Senior Assistant Regional Counsel
U.S. EPA - Region III
Counsel for Complainant